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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KERRY LEWIS ALEXANDER, Defendant and Appellant.	F056447 (Super. Ct. No. MF47239A) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. John D. Kirihara, Judge.

James H. Dippery, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Kerry Lewis Alexander of vehicle tampering, possessing stolen property, and possessing burglary tools. He raises four contentions in this appeal: (1) the evidence was insufficient to sustain the convictions; (2) the prosecutor committed misconduct in structuring a plea agreement with his codefendant, Melvin Webb; (3) the trial court erred in determining Webb had a Fifth Amendment privilege or, alternatively, in failing sua sponte to grant immunity to Webb; and (4) defense counsel rendered ineffective assistance. We reject Alexander's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Deputy Sheriff Brankel Nobari was on patrol at 6:43 a.m. when he saw a red minivan on the side of the road with a flat tire. Nobari stopped and got out of his vehicle. All of the minivan's doors were closed and the driver's side doors were locked. Nobari did not see anything out of the ordinary in the minivan, so he got back into his vehicle and drove away.

About an hour later, Nobari was driving by the minivan again. This time, the sliding passenger's door was open. Nobari saw two men, Alexander and Webb, lean inside the minivan and then walk across the road to a parked PT Cruiser. Nobari saw them do this several times, but was unable to see if the men were carrying anything between the cars.

Both men walked over to the PT Cruiser. Nobari approached Alexander and Webb, who seemed nervous. Nobari looked inside the PT Cruiser before he spoke to the two men. Several items inside the car caught his attention. Inside the PT Cruiser were keys for Toyota, Honda, Nissan, and Ford vehicles. There also were keys that appeared to open community mailboxes and vending machines. There were some tools as well. Nobari also saw a car battery and a police scanner between the driver's and passenger's seats. Nobari found a backpack inside the PT Cruiser with a wallet, ATM card, and driver's license in the name of Patricia Rice.

Jessica Rice (Rice) was the registered owner of the minivan and was in the minivan when the tire blew out. Rice did not have a spare tire, so she left the van locked and obtained a ride home. Rice checked all the minivan's doors to be sure they were locked before leaving the vehicle.

When Rice received a call from the Merced County Sheriff's Department, she returned to where she had left her minivan. Upon returning, Rice discovered the side and rear doors of the minivan were open, the battery had been removed and the cables cut, and items that had been in the minivan were in the back of a nearby PT Cruiser. She identified the backpack and contents found by Nobari as belonging to her daughter, Patricia.

Alexander was charged with burglarizing a vehicle, receiving stolen property, and possession of burglary tools. It also was alleged that he had served three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).[1]

A jury found Alexander not guilty of vehicle burglary, but guilty of the lesser offense of vehicle tampering. The jury also found him guilty of receiving stolen property and possession of burglary tools. The prior prison term enhancements were found not true in a court trial.

The trial court imposed a sentence of three years for receiving stolen property and concurrent six-month terms for each of the other two convictions. The trial court also awarded credits and assessed fines and penalties.

DISCUSSION

Alexander raises four issues in this appeal. He first contends the evidence was insufficient to sustain the convictions. Second, he claims the prosecutor committed prejudicial misconduct by structuring Webb's plea agreement so as to make Webb unavailable as a defense witness. Third, he argues the trial court abused its discretion

[1]All further statutory references are to the Penal Code unless otherwise noted.

when it failed to grant immunity to Webb sua sponte or to declare that Webb no longer had a Fifth Amendment privilege precluding his testifying. Finally, he contends his defense counsel rendered ineffective assistance by failing to request that Webb be granted immunity.

I. Analysis of Evidence Supporting Convictions

Alexander argues the evidence was insufficient to support his convictions because it was circumstantial and consistent with a theory of innocence. Specifically, Alexander contends that his presence at the PT Cruiser during the time when property was stolen from the minivan and transferred to the PT Cruiser was circumstantial evidence that "may be suspicious, but is not enough to support the verdicts." If only it were so.

Standard of review

In addressing a challenge to the sufficiency of the evidence supporting Alexander's convictions, this court must determine "'whether from the evidence, including all reasonable inferences to be drawn there from, there is any substantial evidence of the existence of each element of the offense charged.' [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) In making this determination, "[the appellate court] must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

The standard of review is the same when the People rely mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Bean* (1988) 46 Cal.3d 919, 932 [conviction based on circumstantial evidence will be affirmed if circumstances reasonably justify trier of fact's findings].) Substantial evidence includes circumstantial evidence and the reasonable inferences drawn from that evidence. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139 (*Ceja*).)

Vehicle tampering

Vehicle Code section 10852 provides: "No person shall either individually or in association with one or more other persons, willfully injure or tamper with any vehicle or the contents thereof or break or remove any part of a vehicle without the consent of the owner." In this context, "tamper" means to "'interfere with'" the vehicle. (*People v. Anderson* (1975) 15 Cal. 3d 806, 810.) The jury properly was instructed on the elements of this offense. There was ample evidence to support this conviction.

Nobari watched as Alexander and Webb made repeated trips between the minivan and the PT Cruiser. Both Webb and Alexander were present when Nobari found the minivan's battery in the PT Cruiser. It was after Rice left her minivan on the side of the road that the battery was removed and the battery cables cut. There was no evidence she gave anyone permission to cut her battery cables and take the battery.

These facts were sufficient for the jury reasonably to infer that Alexander tampered with Rice's minivan by removing the battery and cutting the cables, either alone or in concert with Webb, and that he did not have Rice's consent. (*Ceja, supra,* 4 Cal.4th at pp. 1138-1139.)

Receiving stolen property

There are three elements to the offense of receiving stolen property under section 496, subdivision (a): "(1) stolen property; (2) knowledge that the property was stolen; and (3) possession of the stolen property." (*People v. King* (2000) 81 Cal.App.4th 472, 476.) The jury was instructed on the elements of the offense. Again, substantial evidence supports Alexander's conviction for this offense.

When Rice left her minivan by the side of the road, her daughter Patricia's backpack and wallet were inside the locked minivan. When Nobari first saw the minivan, the doors were closed and locked. When he saw the minivan an hour later, the doors were open and Alexander and Webb were leaning into the open doorway of the minivan

and making repeated trips to the PT Cruiser. Nobari found Patricia's backpack and wallet in the PT Cruiser.

Even though Alexander chooses to characterize this evidence as circumstantial, it was substantial evidence from which the jury reasonably could infer that Alexander was in joint possession of the backpack and wallet belonging to Patricia, which he knew to be stolen from the minivan. (*Ceja*, *supra*, 4 Cal.4th at pp. 1138-1139.)

Possession of burglary tools

Section 466 provides, in relevant part, that any person who possesses a "screwdriver … or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle … is guilty of a misdemeanor." Possession of burglary tools is a "'specific intent'" offense because it requires the mental state to commit the future act of breaking or entering into one of the enumerated locations. (See *People v. Davis* (1995) 10 Cal.4th 463, 518-519, fn. 15.)

The elements of the crime described in section 466 are "possession and intent." (*People v. Valenzuela* (2001) 92 Cal.App.4th 768, 777.) Possession of a screwdriver, or other instrument or tool, "is lawful until it is intended to be used feloniously." (*Ibid*.) *Specific intent* requires the prosecution to prove that the object was intended to be possessed as a burglary tool rather than for an innocent reason. The only way to meet that burden is with evidence that the possessor had the intent to use the object for an unlawful rather than a harmless purpose. (See *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 (*Fannin*).)

Intent is a question of fact that may be inferred from the circumstances. (*People v. DeLeon* (1982) 138 Cal.App.3d 602, 606.) Indeed, it is recognized that "'[t]he element of intent is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence.' [Citations.]" (*People v. Falck* (1997) 52 Cal.App.4th 287, 299 (*Falck*).)

Nobari saw keys for several different makes of vehicles in the PT Cruiser, along with drills and other tools. One of the types of keys found inside the PT Cruiser was for Nissan vehicles, and the minivan here was made by Nissan. Rice testified the minivan was locked when she left it by the side of the road. Yet, when Nobari went by the minivan a second time, the minivan was unlocked and Alexander and Webb were making numerous trips between the minivan and the PT Cruiser.

It is clear from the evidence that Alexander had individual or joint possession of tools and numerous vehicle keys, including Nissan keys; and those keys and tools *could* be used for the purpose of breaking into vehicles. The breaking into of the previously locked Nissan minivan constitutes substantial evidence that the keys and tools *were used* and possessed with the specific intent to break into vehicles. (*Fannin, supra,* 91 Cal.App.4th at p. 1404; *Falck, supra,* 52 Cal.App.4th at p. 299.)

II. Prosecutorial Misconduct

Alexander contends the prosecutor committed prejudicial misconduct by structuring a plea agreement with his codefendant, Webb, in a manner that prevented Webb from testifying at Alexander's trial. We disagree.

Factual summary

On December 17, 2007, Webb pled guilty to vehicle burglary in exchange for a two-year prison sentence. The plea agreement did not call for Webb to testify in Alexander's case. Sentencing was continued several times. Ultimately, Webb was sentenced on October 22, 2008.

During Alexander's trial, Webb was called to testify by the defense. Upon taking the stand and being asked the first question, Webb asserted his Fifth Amendment privilege upon the advice of counsel. Webb, however, indicated he wanted to say something. Webb then conferred with his counsel and testified that he was with Alexander the morning of the incident. He stated, "Because of my actions that man's in

trouble. What I did is why he's in jail." At this point, the trial court interrupted and stated:

> "[I]f he's going to waive his privilege, then he's going to take the stand and he's going to answer all questions that are relevant to that day. Mr. Webb, you got to make up your mind. It can't be halfway Mr. Webb. You're going to have to either testify in full or not testify. There's really no in between."

Webb's counsel then asked to speak with his client. The trial court deferred to the next morning any further potential testimony by Webb.

The following morning, Webb asserted his Fifth Amendment privilege and declined to testify. Counsel for Alexander asked the trial court to determine if judgment had been pronounced in Webb's case. The trial court determined that sentence had not been pronounced, and the prosecutor stated that he had made a "special arrangement" with defense counsel so that Webb's sentencing would be delayed until after Alexander's case was resolved.

Alexander's counsel argued that judgment had been pronounced in Webb's case and the privilege should no longer apply and asked the trial court to make that finding. The trial court denied the request.

Analysis

Alexander has failed to establish that the prosecutor acted improperly. The cases cited by Alexander in support of his contention are inapposite. The cited cases are instances where a potential witness was threatened with negative consequences, specifically additional charges, if the witness testified on behalf of a defendant. (*Webb v. Texas* (1972) 409 U.S. 95, 97 [judge told witness the court expected witness to lie and warned witness of consequences of perjury]; *People v. Bryant* (1984) 157 Cal.App.3d 582, 593-594 [prosecutor threatened to file perjury charges against a potential defense witness if the witness testified].) The record here contains no evidence that Webb was

threatened with negative consequences or additional charges if he testified on Alexander's behalf.

A plea agreement is essentially a contract between the defendant and the prosecutor, to which the trial court consents to be bound. (*People v. Ames* (1989) 213 Cal.App.3d 1214, 1217.) The trial court preliminarily accepted the plea agreement. The prosecutor was bound to honor the plea agreement because the state's failure to honor a plea agreement violates a defendant's due process rights. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 636.) The prosecutor honored Webb's plea agreement. There is no indication in the record that the prosecutor attempted to influence Webb either to testify or not testify in Alexander's case by way of the plea agreement.

Regardless, Alexander can show no prejudice under any standard. Assuming Webb would have testified that the entire incident was his idea, Webb's testimony would not have absolved Alexander of liability for his actions. Alexander was observed making numerous trips between the minivan and the PT Cruiser; the PT Cruiser had numerous stolen items in it; the minivan had been tampered with when the battery was removed; and the PT Cruiser contained items that could be used to break into vehicles.

Although Webb pled guilty to vehicle burglary, the jury found Alexander not guilty of this offense. The jury could, and did, reasonably infer from the evidence that Alexander willingly participated in all other aspects of the criminal activity and jointly possessed the items in the PT Cruiser, thus engaging in conduct that constituted vehicle tampering, possession of stolen property, and possession of burglary tools.

III. Trial Court Error

Alexander contends the trial court should have determined Alexander had no Fifth Amendment privilege, or else should have granted Webb immunity sua sponte. We reject both contentions.

Webb entered into a plea agreement, but had not been sentenced at the time of Alexander's trial. Until such time as a defendant is formally sentenced under a plea

agreement, a trial court may withdraw its approval of the plea agreement. (§ 1192.5.) The trial court is required to inform a defendant of the provision of section 1192.5, which permits the trial court to withdraw approval of the plea agreement until the defendant is sentenced.

At the time Webb was called to testify by Alexander's counsel, Webb's Fifth Amendment privilege remained intact. "[T]he privilege expires when the time to file an appeal has passed with no notice of appeal filed." (*People v. Fonseca* (1995) 36 Cal.App.4th 631, 637.) Webb had not been sentenced; the time to file an appeal had not even commenced, let alone expired. Even if Webb had been sentenced, there was no guaranty that an appeal would not be filed, leaving intact the Fifth Amendment privilege. Webb could have chosen to waive his Fifth Amendment privilege and testify, regardless of the status of sentencing or an appeal, but he chose not to do so and he could not be compelled to testify.

Alexander similarly is mistaken when he contends the trial court should have granted immunity to Webb sua sponte and compelled Webb's testimony. It is not the prerogative of the trial court to grant immunity. The determination of whether to grant immunity rests solely with the prosecutor because charging decisions fall within prosecutorial purview and discretion. (*In re Weber* (1974) 11 Cal.3d 703, 719-720 (*Weber*).)

IV. Ineffective Assistance of Counsel

Alexander contends his counsel rendered ineffective assistance by failing to request that the trial court grant Webb immunity. Again, we disagree.

A claim of ineffective assistance of counsel generally should be raised in a petition for writ of habeas corpus, not on direct appeal, because the reasons for counsel's actions are not always apparent from a review of the record. (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.) In Alexander's case, however, it is apparent from the record that defense counsel did not render ineffective assistance.

In order to establish ineffective assistance, Alexander must prove that counsel's performance was below the standard of reasonably competent representation based on prevailing norms; and, but for the ineffectiveness of counsel, he would have received a more favorable outcome. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414 (*Ochoa*).) Neither of these two elements of ineffective representation has been shown.

First, as we noted in part III of this opinion, it was not the prerogative of the trial court to grant immunity. (*Weber, supra,* 11 Cal.3d at pp. 719-720.) As the law does not require idle acts, an attorney has no duty to make a futile request. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587.) Defense counsel cannot be deemed to have rendered ineffective assistance for failing to make a request that was not within the trial court's ability to grant.

Second, as we noted in part II, even if Webb had testified, his testimony would not have absolved Alexander of criminal liability for participating in the criminal activity. Thus, Alexander cannot establish that he would have received a more favorable outcome if Webb had testified under a grant of immunity and therefore no prejudice has been shown. (*Ochoa, supra,* 19 Cal.4th at p. 414.)

V. Section 4019 Amendments

Pursuant to a standing order of this court issued on February 11, 2010, the issue of the applicability of the January 25, 2010, amendments to section 4019 (Stats. 2009-2010, 3d Ex. Sess, ch. 28, § 50) is deemed raised without further briefing by the parties. The amendments to section 4019 affected the calculation of custody credits. In our published opinion in *People v. Rodriguez* (Mar. 1, 2010, F057533) __ Cal.App.4th __ [2010 Cal.App. LEXIS 250], we held the January 25, 2010, amendments to section 4019 applied prospectively only to those persons who had not been sentenced at the time the amendments went into effect. (*Rodriguez,* at pp. __, __ [2010 Cal.App. LEXIS 250, *4-*5, *15-*16].) We also rejected the contention that prospective application of the amendments violated equal protection. (*Id.* at p. __ [2010 Cal.App. LEXIS 250, *19-

*20.) We thus reject any argument Alexander is deemed to have made for additional custody credits.

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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LEVY, Acting P.J.

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KANE, J.